Department of Law Monthly Report
June, 2007

Generally Speaking

Comings and Goings

Please welcome: **Linda Mockta** to the Collections and Support Section as an Administrative Clerk II; **Lorna Weidling**, LOA I in the Torts and Workers' Compensation Section; and **Terri Floyd**, paralegal in the Natural Resources Section; **Colby Morris,** interning this summer for Attorney General Talis Colberg and Special Assistant Monica Jenicek; and **Wil Gerken**, analyst/programmer in the Information Services Section.

A warm welcome back to AAGs **Vennie Nemecek** and **Roger Rom,** both returning to the Child Protection Section.

In This Issue

The Kenai DAO's newest employee is **Maribeth Snell,** who started this month. She is a law office assistant who works half-time on criminal cases for the DA's office and half-time on CINA cases for the Civil Division. She moved back to the Kenai Peninsula from a legal career in New York; the office is very pleased to have her join them.

Congratulations to **Lance Joanis** who became the DA for the Bethel office on June 1st when **DA Joe Slusser** retired on May 31st.

Civil Division

Child Protection

New CINA cases based upon allegations in OCS petitions:

The department received a report that a six-year-old boy received an excessive amount of corporal punishment from his father, resulting in marks and bruises to the back of his legs. The father was arrested and the mother's whereabouts are unknown. OCS assumed custody.

A woman was pulled over on a traffic stop. She was intoxicated and in possession of marijuana. Her 11-year-old boys were in the car. The mother was arrested for felony DUI as this was her third DUI. As no appropriate caregiver could be found, OCS assumed custody.

OCS assumed emergency custody of a medically complex baby after she was found to have new and healing fractures. The fractures appeared to be non-accidental. The whereabouts of the father are unknown.

OCS assumed emergency custody of three boys after an allegation of inadequate supervision. Upon investigation, the mother was found to have mental health issues that were interfering with her ability to parent and the boys themselves were

found to have special needs. No relative could be located to take the boys and the children's fathers' whereabouts are unknown.

OCS assumed emergency custody of a 1-year-old after his caregivers indicated they could no longer care for the child. The mother would be gone from the home for days at a time. She has a history of substance abuse. The father had not seen the child in over a month.

A mother requested the assistance of police due to a fight with her boyfriend, the father of her four children. Upon entering the home, it was found to be filthy, with feces and rotting food strewn about. Sex toys and drugs were also found out in the open. The mother has a history of substance abuse and has failed to follow through on services offered by OCS during previous contacts. The father was arrested on an old warrant. OCS assumed custody.

OCS received a report that an infant had been abandoned at the hospital. The mother brought the child to the hospital and indicated that she could not care for the child as she was experiencing psychotic symptoms. The mother was admitted to the hospital. The baby's father could not be located. OCS assumed custody.

A newborn baby was released to the custody of her mother on the provision that the family remain with relatives. The parents have a history of substance abuse and domestic violence. An appropriate caregiver was located and OCS is attempting to work with the family to avoid removal of the child.

Kenai police responded to a domestic violence call. Both parents were intoxicated and could not care for their children. The father assaulted the police officers and was arrested. This family has a prior history with OCS, but all previous efforts to address substance abuse, domestic violence and mental health issues have failed. OCS assumed custody.

Numerous children were taken into custody as a result of serious risk of harm as a result of their parents' substance abuse and domestic violence.

Commercial and Fair Business

Alaska Joins Multistate ChoicePoint Settlement

The state entered into a multi-state settlement with ChoicePoint, Inc. to resolve allegations that the company failed to adequately maintain the privacy and security of consumer's personally identifiable information that was in its control. ChoicePoint provides identification and credential verification services to businesses, government and non-profit organizations. The company collects, maintains, and distributes consumers' personally identifiable information. In February 2005, ChoicePoint announced that criminals posing as legitimate businesses gained access to consumers' personally identifiable information, which was later used by the thieves to commit identity theft. Under the settlement, ChoicePoint will make significant, ongoing changes in the way that the company credentials new customers who have access to personally identifiable information, and will provide greater protection for publicly available information, including Social Security numbers.

Big Game Commercial Services Board Affirms Summary Suspension and Revokes License of Dillingham Guide-Outfitter

On June 1, 2007, after a meeting, the Big Game Commercial Services Board ("board") issued two decisions concerning Dillingham guide-outfitter Byron Lamb. In the first decision, the board rejected the proposed decision of Administrative Law Judge Kay Howard and affirmed its prior 30 day summary suspension against Lamb. Specifically, the board rejected the ALJ's interpretation of the summary suspension statute, finding instead that Lamb's eight felony assault convictions involving his own client, another guide-outfitter, that guide-outfitter's clients, and a pilot working for that guide-outfitter, along with the report and testimony of an expert guide-

outfitter hired by the Division of Corporations, Business and Professional Licensing ("division"), demonstrated that Lamb posed a clear and immediate danger to the public health and safety pursuant to AS 08.54.710(i).

In the second decision, the board granted the petition for default judgment filed by the division and permanently revoked Lamb's guide-outfitter license due to his failure to file a notice of defense in response to the accusation served on him by the division. The accusation alleged that, based on Lamb's felony assault convictions, he violated numerous disciplinary statutes which justified revocation of his license. AAG Robert Auth represented the Division of Corporations, Business and Professional Licensing in these matters.

Two Hearings Before OAH Involving License Denials

AAG Jenna Conley had two hearings before the Office of Administrative Hearings (OAH) in two separate license denial matters. The first hearing was held on June 12th in front of Administrative Law Judge Chris Kennedy, involving denial of an engineer's license. The applicant asserted he was entitled to continue testing for his engineer's license even though he has taken and failed the Professional Engineer's Examination five times and the application criteria have changed. He applied for his engineer's license by examination in 2002. Adams took and passed the Fundamentals of Engineering Examination, but then took and failed the Professional Engineer's Examination, five times. Pursuant to 12 AAC 36.040, the applicant had to reapply to the board to sit for the examination because of the past exam failures. In the five years that passed between the applicant's first application to take the exam and his second, 12 AAC 36.063 was amended to require at least 2 years of education in an accredited engineering curriculum. 12 AAC 36.063 previously allowed an individual with 12 years of work experience but no education in engineering to sit for the examination. Under the new regulation, the applicant now does not meet the criteria to sit for the examination. The division is awaiting Judge Kennedy's decision.

AAG Conley's second hearing was held June 18 in front of Administrative Law Judge Rebecca Pauli involving an individual's application for a dental hygienist license. The license was denied by the Board of Dental Examiners based upon AS 08.32.160, because the applicant had employed fraud in applying for a hygienist license in Oregon. The applicant had been denied a dental hygienist license in Oregon because of lying on the application about convictions for drug use and driving under the influence. Notwithstanding Oregon's license denial, the applicant claimed she was entitled to a license in Alaska. The applicant admits to lying to the Oregon dental board regarding her convictions, however she felt that her behavior was justified as these issues were of an "embarrassing" nature. The applicant argued that because she hadn't lied to Alaska's dental board and admitted her past cocaine and alcohol problems she should be issued a license in Alaska. The division is awaiting Judge Pauli's decision.

Favorable Alaska Supreme Court Decision in Gaming Case

The Alaska Supreme Court recently affirmed the dismissal of a suit brought in Anchorage Superior Court by Peter Roberts, an Anchorage bicycle shop owner that alleged the Department of Revenue had injured him by allowing a non-profit corporation to use pull-tab proceeds to fund a free to the public bicycle program that competed with his business. Mr. Roberts is the sole shareholder of a corporation that actually owns the bicycle shop. Previously he had brought the same suit in the name of the corporation but it was dismissed because of a state law that requires corporations to appear in court by licensed counsel. In the suit that was the subject of the Supreme Court appeal, Mr. Roberts tried to get around the attorney requirement by having the corporation assign its right to him.

The Supreme Court rejected the assignment of rights as an invalid attempt to circumvent a valid statutory requirement. The court also affirmed that the issuance of a gaming permit to Earth did not violate an Alaska statute that mandates that charitable gaming proceeds be only used for charitable purposes. Finally, the court found that Mr. Roberts is not a public interest litigant, which makes him liable to pay the $5,225 in attorney's fees awarded the state by the superior court. AAG Dan Branch represented the state in this matter.

Debtor Reopens Chapter 7 to Determine If Student Loan Debt Discharged in 1987

In 1987, a debtor filed a Chapter 7 bankruptcy and received a general discharge. At that time, she had two outstanding Alaska student loans: one from several years before which had gone into repayment in 1981 and another which had gone into repayment in 1986. In 1987 the Bankruptcy Code provided that student loans which had been in repayment for less than five years were not discharged unless the court determined there was an undue hardship. In determining if a loan has been in repayment for less than five years, suspensions of the repayment period are not included in the calculation. Grace periods, deferment periods and reduction in payment periods are considered applicable suspensions of the repayment period and are specifically excluded in calculating the five-year period. The debtor received an in-school deferment from September 1984 through November 1985. Her first loan was, therefore, only in repayment status 58 months when she filed her bankruptcy in 1987 and was not discharged. Her second loan had only been in repayment for less than 12 months, so this loan was clearly not discharged. She filed another chapter 7 case in 2000 which was converted to a Chapter 13 and then back to a Chapter 7. By then the law was that no student loan was discharged unless it caused an undue hardship. She never filed an adversary proceeding in either case to have her student loans determined to be discharged because they would cause an undue hardship for her to repay.

ACPE (Alaska Commission on Post Secondary Education) recently began administratively garnishing her wages, she requested the court to reopen her 1987 case and she filed an adversary proceeding. ACPE has filed a motion for summary judgment arguing that this case should be closed because (1) her loans were not discharged in 1987 or in 2004, (2) too much time has elapsed (20 years) since her 1987 bankruptcy to allow her to reopen the case to file an adversary proceeding, and (3) laches precludes her from being able to reopen this case. AAG Mary Ellen Beardsley is representing ACPE in this matter.

Human Services

Litigation Update

AAG Rebecca Polizzotto and Section Chief Stacie Kraly continue to work on post administrative hearing briefing and remand issues in the South Anchorage Ambulatory Surgery Center and the Fairbanks Surgery Center cases. The cases have been contentious and time consuming, but are coming to a close.

After reconsideration of her original decision related to Dr. Bridges' request to purchase an MRI and operate it in Fairbanks, Section Chief Stacie Kraly is in negotiations with counsel for Dr. Bridges to settle the complaint for declaratory and injunctive relief he filed in May. She is hopeful that the matter can be resolved in the next week or two.

AAG Libby Bakalar prevailed on a motion for summary judgment related to the TB testing program in schools. This was her fist motion for summary judgment and she did a fantastic job, prevailing on all points. It is not clear whether the case will be appealed.

Medicaid

Subrogation/Liens

During the month of June to date, the section collected a total of $53,562.07 as a result of 17 case resolutions. The section has opened 39 new matters with a current "inventory" of 703 active matters, and 805 matters have been resolved. The calendar year to date total collection amount is now $636,894.48. Beginning next month, the section will assume additional Medicaid recovery activity, including estate recovery, and welcome the addition of AAG Caitlin Shortell to the "subrogation team".

Other

Senior Care

Emergency regulations for the Department of Health and Social Services were filed in June to continue the senior care benefit as an interim solution. In addition, the legislature convened a special session to address this issue on June 26, 2007. After a very short session, a bill authorizing the Senior Benefit program passed both houses by wide margins.

Labor and State Affairs

Education

Judge Gleason released her decision on June 21 in ***Moore v. State of Alaska***. The case, which challenged the adequacy of public education in Alaska, was tried during the month of October 2006. The decision vindicates the state's position that its spending on public education satisfied any requirements in the state constitution's Education Clause. The court reasoned that the state's constitutional duty to establish and maintain schools in article VII, section 1, consisted of four parts: (1) rational educational standards; (2) adequate assessment to determine whether students are actually learning what is set out in the standards; (3) adequate funding so the schools have the ability to instruct; and (4) adequate state accountability and oversight over the school districts to ensure that they are fulfilling the state's constitutional duty. The court concluded that the state provided appropriate educational standards and assessment, and rejected challenges to the system, and amounts, for funding education.

However, the court found, on the basis of the chronically poor performance of one of the plaintiff school districts—Yupiit—that the state's oversight of the local school districts and its efforts to make them accountable fell short. To allow the legislature and executive branch an opportunity to improve state oversight of the local districts, the court stayed the decision for one year. In addition, the court rejected an argument that the state had a duty to provide a pre-kindergarten program and a claim that the funding formula violated substantive due process, but it did conclude that it was fundamentally unfair under the Due Process Clause to condition receipt of a high school diploma on passage of an exit exam for those students (in Yupiit and other schools that the state or court may later identify) who were not provided an adequate education because of a deficiency in state oversight.

To allow the state an opportunity to address this deficiency, the court stayed the decision one year and expressly allowed the state to continue to administer the exit exam. The state was represented by AAGs Neil Slotnick, Kathleen Strasbaugh, Anne Johnson, Dean Guaneli, and litigation assistant Terri Begley-Allen.

Elections

The ACLU filed ***Nick v. Parnell*** this month, claiming that the Voting Rights Act requires the state to make printed election ballots available in Yup'ik, despite the Voting Rights Act's specific exemption to the requirement, when applicable, to provide a ballot in a non-English language in the case of Alaska Natives if the predominant language is historically unwritten. AAG Sarah Felix is representing the state.

Employment

Farmer v. DOT. This month Judge Spaan dismissed this action by a former Department of Transportation and Public Facilities employee claiming whistleblower status. The basis of the dismissal was failure to prosecute. Gary Gantz from the Transportation section and AAG Brenda Page represented DOT in this matter.

DeNardo v. State. After the superior court's dismissal last month of Daniel DeNardo's action concerning the failure of Division of Petroleum Revenue to hire him, Mr. DeNardo re-filed the action against division personnel named in the first action and added individuals involved in the litigation. The claims reiterate the earlier charges and add charges claiming misconduct in the earlier litigation. AAG Brenda Page is representing the state defendants.

Labor & Workforce Development

AAG Larry McKinstry settled ***ABC v. State***, which the Associated Builders and Contractors filed challenging the Department of Labor & Workforce Development's administration of the STEP program, which provides grants to fund work training programs. The claim, rejected by the court after a motion for a preliminary injunction, was that the department's administration of the program violated the statute.

Motor Vehicles

Poirot v. DMV. On June 14 Judge Spaan issued his decision affirming the DMV in this case. The appellant Poirot appealed the DMV's refusal to set aside a 1990 license revocation as part of a revocation termination decision in 2006. He argued that because he had been acquitted of the 1990 DUI charge after offering a necessity defense that it was manifestly unjust to enforce the revocation. The court upheld the DMV's decision holding that the appeal was untimely, that a necessity defense is not available in a civil license revocation hearing, and that, even if it was, there was no manifest injustice in declining to allow Poirot to reopen a 16-year-old license revocation. AAG Margaret Paton-Walsh represented DMV.

Office of Rate Review

AAG Linda Kesterson worked with the staff of the Office of Rate Review to settle an appeal by Valley Hospital. This appeal is the final appeal under a rate system that has been the source of much litigation and which was replaced in December 2000. The Department of Health and Social Services will pay the hospital $55,000—a compromise between the $39,720 the Office of Rate Review calculated was due under a proposed decision (pending before the Commissioner but stayed while a related case was decided.) and the $72,820 the facility claimed was due under the decision.

Retirement & Benefits

Late last month the Office of Administrative Hearings granted AAG Joan Wilkerson's motion for summary adjudication in a state retiree's appeal from a decision denying her retirement benefits at the rates provided in pre-retirement estimates by the Division of Retirement and Benefits. Despite numerous warnings not to rely on the division's estimates and to check service and pay rates with the public employer, the retiree was disappointed after retirement when her benefits were lower than expected. Administrative Law Judge Hemenway determined that she had established neither equitable nor promissory estoppel, and dismissed the appeal.

Legislation and Regulations

During June 2007, the Legislation and Regulations Section spent an active month editing several bill reviews for legal issues on bills pending before the governor for action. The section also prepared for the special session on senior benefits, scheduled to begin on June 26, 2007, in Anchorage, Alaska.

Regulations projects reviewed in the section during June 2007 include:

Department of Revenue (corporate income tax and water transportation carriers); Department of Health and Social Services (juvenile justice institutional classifications); State Board of Education and Early Development (consequences for schools not demonstrating adequate yearly progress; adequate yearly progress by schools; highly qualified teachers); Board of Barbers and Hairdressers (school licensure requirements and definitions); Alaska Labor Relations Agency (petition procedures); and Alaska Oil and Gas Conservation Commission (blowout prevention equipment testing).

The section also began plans for its annual regulations training classes to be held at the end of August 2007.

Natural Resources

Division of Agriculture and the Board of Agriculture and Conservation

Throughout the month of June, AAG Tina Otto provided day-to-day advice to DNR, the Division of Agriculture and the Board of Agriculture and Conservation. On June 6, 2007, the Creamery Corporation voted to shut down the dairy processing operations of Matanuska Maid by July 7. The state, through the Agricultural Revolving Loan Fund and as administered by the Board of Agriculture and Conservation, is the sole shareholder of the Creamery Corporation. On June 18, 2007, the governor replaced all existing BAC members with new members. The BAC held its annual shareholder's meeting and an emergency meeting on June 19, 2007. The BAC elected new directors to serve on the Creamery Corporation's Board of Directors.

Situk River Access

On June 26, final signatures were secured on an agreement under which ADF&G and DNR will purchase the road to and boat launch on the lower Situk River, near Yakutat, in order to guarantee continued public access. The road and boat launch are currently within the boundaries of the Setuck Harry Native allotment, but have been surveyed out for the sale. In the agreement, the allotment heirs also have agreed to release the state from all potential claims arising directly or indirectly from past public use of the road and boat launch. Closing will occur later this summer. AAG John Baker represents ADF&G and DNR in this transaction.

Opinions, Appeals and Ethics

This month the section issued a non-confidential opinion addressing conflict disclosure procedures for the Alaska Permanent Fund Corporation and two confidential opinions as well as responded to numerous informal requests for advice.

AAG Judy Bockmon has been receiving and reviewing annual outside employment disclosures. She is also considering possible changes to the department's multiple representation policy to ensure appropriate decisions regarding the need for outside counsel in some circumstances, as suggested by Section Chief Joanne Grace's earlier research and response to NAAG's inquiry on that topic.

AAGs Judy Bockmon and Dave Jones fielded questions and provided training on the ethics bill that the legislature passed this session. Part of the training they provided was a presentation on the ethics bill to the Administrative Law Section of the Alaska Bar Association. They are continuing to work on updating ethics guidance to incorporate the amendments to the Ethics Act. AAG Judy Bockmon will be meeting with Department of Administration training staff to coordinate their development of a new ethics component to their

supervisor training class as well as general information for all employees.

Appeals/Litigation

American Dental Society, Alaska Dental Society et. al. v. Alaska Native Tribal Health Consortium and State of Alaska. AAG Paul Lyle participated in oral argument on the parties' respective motions for summary judgment in the dental health aide case on June 15th before Judge Rindner. At issue in the case is whether the Alaska Dental Practices Act (under which dentists and dental hygienists are licensed and regulated) is preempted by an Alaska-specific section of the federal Indian Health Care Improvement Act (IHCIA). Section 1616/ of the IHCIA requires the Community Health Aide Certification Board of the Indian Health Service to develop curriculum to train and use Alaska community health aides to provide "health care, health promotion and disease prevention services" to Indian Health Service beneficiaries who reside in rural Alaska.

In early 2005, the federal Community Health Aide Board licensed eight federally-trained dental health aide therapists to begin working in rural areas. The state issued an opinion in August 2005 concluding that the state's Dental Practices Act was preempted by federal law. The plaintiffs sued the tribal consortium and the state alleging that state law was not preempted and that dental health aide therapists must be licensed as dentists or dental hygienists under state law before they could begin serving patients.

Judge Rindner was active in his questioning of both sides during oral argument. The judge's questions centered on the purpose of the Indian Health Care Improvement Act and how to discern the intent of Congress in enacting the Alaska Community Health Aide Program.

The parties agreed that, if the court determines state law is not preempted, the court should return the matter to the Attorney General for consideration of executive branch action in light of the court's legal ruling. The parties also agreed that, if state law is preempted, the remaining issues (whether there is a private right of action to enforce the state's occupational licensing laws, separation of powers and equal protection) need not be decided. Judge Rindner said he would try to have an opinion issued within two weeks.

Murkowski v. Alaska AFL-CIO. AAG Dave Jones also dealt in June with the effects of the Alaska Supreme Court's recent ruling that, by making a statutory change in 2003, the legislature validly eliminated the exception for public interest litigants from the standard method of awarding attorney fees in Alaska court cases. Following up on that ruling, he filed documents in a Juneau case concerning an attorney fees award that the Alaska Supreme Court sent back to the superior court for recalculation as part of its ruling on the public interest litigant exception.

DeNardo v. Stowers. On June 1st, the superior court granted Judge Stowers' motion to dismiss all claims against him and denied Mr. DeNardo's motions for discovery and for sanctions. The genesis of this action was a traffic stop that Mr. DeNardo considered unjust. Mr. DeNardo believed the stop violated his constitutional rights so in a prior action, he sued the municipality and several other people involved with the stop. Judge Stowers dismissed the action. Mr. DeNardo considered that unjust and sued Judge Stowers for several unfavorable rulings. He also sued the defendants from the prior suit as well as their attorney.

Judge Stowers moved to dismiss based on judicial immunity and collateral estoppel. To the extent Mr. DeNardo was making any claims for equitable relief, Judge Stowers argued that Mr. DeNardo had failed to show that he could meet the prerequisites for such relief. In a nutshell, if Mr. DeNardo takes issue with an unfavorable ruling, his remedy is to appeal, not to file a new action against the judge and the defendants in the closed case. The superior court agreed that Mr.

DeNardo had failed to state a claim upon which relief could be granted and ordered the claims against Judge Stowers dismissed. Judge Stowers' motion for entry of a pre-filing screening order, aimed at disrupting Mr. DeNardo's pattern of suing judges with whom he disagrees, is still pending. It was scheduled for oral argument this month, but the date had to be vacated in order to permit another judge time to review the order denying Mr. DeNardo's last minute motion for recusal. AAG Laura Bottger is handling this case.

Wetherhorn v. API. The Supreme Court requested supplemental briefing on the effect of its recent decision, *State v. Nunapitchuk,* 156 P.3d 398 (Alaska 2007), on Ms. Wetherhorn's request for full fees as a public interest litigant. API had opposed Ms. Wetherhorn's original request for full fees based primarily on the revised public interest litigant fee statute, which the Court later upheld in its *Nunapitchuk* decision. Under the new law, full fees are only available to a public interest litigant for fees incurred on constitutional issues upon which the party prevailed. API is not convinced that Ms. Wetherhorn prevailed on the one constitutional issue decided. But if she is deemed to have prevailed, she should only receive full fees for work devoted to that discrete issue. In her supplemental briefing, Ms. Wetherhorn advances several other theories to support her claim for full fees, regardless of prevailing party status. API will file its opposing briefing by the end of the month. AAG Laura Bottger is handling this case.

Allstate v. Falgoust. The Alaska Supreme Court issued an opinion in *Allstate v. Falgoust*, reversing the trial court in part, affirming in part, and remanding for entry of final judgment. There were two legal issues on appeal. The state (as Appellee) participated in only one of these issues, and prevailed on that issue.

This case arises out of the death of a foster child, S.M., as the result of a physical assault by his foster mother, Melissa Falgoust, and her subsequent delay in obtaining medical care for him. This assault occurred in the presence of two other foster children, D.D. and A.J., whom Melissa coerced into telling the police and foster-care licensing investigators that S.M.'s injuries were self-inflicted. Based on subsequent investigations, A.J and D.D. were removed from the Falgoust foster home, which was closed, and Melissa Falgoust was convicted of manslaughter. Melissa and Douglas Falgousts' homeowners' insurer, Allstate Insurance Company, filed a declaratory judgment action against the Falgousts, D.D., A.J., and the State of Alaska, seeking declaratory rulings that it did not have a duty to defend or indemnify the Falgousts against any tort claims brought by the minors or, in the alternative, that the state was the primary insurer for the alleged harm and Allstate was liable for excess coverage only. The trial court denied Allstate's motions.

Allstate then attempted to pursue additional claims against the state, regarding whether Allstate, the state, or both had a duty to defend and indemnify the Falgousts. Since consideration of these claims would have required duplicative litigation and risked conflicting factual findings by two different courts and since Allstate was not precluded from seeking relief at a later time, the trial court declined to consider the declaratory issues. Allstate appealed this order, as well as the order denying it summary judgment against the Falgousts. The state did not brief the latter issue; only the former.

The Supreme Court reversed the trial court's order denying Allstate summary judgment. In doing so, it concluded that the household exclusion contained in the homeowners' insurance policy barred liability coverage for claims brought by A.J. and D.D. against the Falgousts since these foster children were "insured persons" as defined by the policy. As such, Allstate does not have a duty to defend the Falgousts in the minors' separate tort action.

In relation to the issue briefed by the state, the Supreme Court concluded that the trial court did

not err in declining to consider the additional claims raised by Allstate because of the "substantial uncertainty as to how the defense responsibility between Allstate and the state should be shared." Although acknowledging that Allstate no longer had any obligation with respect to the Falgousts, the Supreme Court determined that "there is little to recommend remand this case to the superior court for a declaration concerning the state's duty to defend or for adjudication of any monetary claim that Allstate may have against the state." Instead, Allstate could seek reimbursement for defense costs incurred in the tort action either by bringing an independent action against the state or by filing a cross-claim in the minors' tort action.

AAG Gail Voigtlander was the trial attorney on behalf of the state; AAG Megan Webb was the appellate attorney.

McCaughey v. Tesoro. AAG Megan Webb filed an amicus brief in McCaughey v. Tesoro, a tort case arising out of an on-the-job injury. The defendants moved for summary judgment, arguing that plaintiff's claims against them are barred since Tesoro was plaintiff's "statutory employer" for purposes of worker's compensation, making worker's compensation the exclusive remedy. In response, plaintiff challenged the constitutionality of AS 23.30.045 and AS 23.30.055 (upon which defendant relied), alleging that the 2004 amendments to these statutes violate his right to equal protection under the Alaska Constitution. These statutes affect workers' compensation benefits. The state has requested permission to submit an amicus curiae response, in which it asserts that the amended statutes do not violate the right to equal protection since they are substantially related to a legitimate governmental interest – ensuring that all employees on a work-site enjoy the protections and benefits of the Alaska Worker's Compensation Act.

Jacobs v. State. AAG Megan Webb participated in oral argument before the Alaska Supreme Court in *Jacobs v. State*. The Jacobs challenge the trial court's dismissal of a civil action they initiated in March 2004. Through that action, the Jacobs asserted that OCS failed to provide them notice that it had assumed emergency custody of their three grandchildren and failed to provide them with any subsequent notices regarding their grandchildren's CINA case. They also asserted that they were entitled to physical custody of the children. They sought declaratory and injunctive relief on their own behalf and injunctive relief on behalf of other grandparents. The trial court found that OCS failed to provide the Jacobs with the required notices but declined to grant the requested relief; instead, it instructed the Jacobs to seek substantive relief through their grandchildren's CINA case, and then dismissed the case. Because the Jacobs have already received relief through the CINA case and do not have standing to obtain injunctive relief on behalf of third parties, the state requested the supreme court dismiss the appeal on mootness and lack of standing.

Regulatory Affairs and Public Advocacy

Stipulated Settlement

RCA/U-06-76/77, GHU/CUC water and wastewater. Golden Heart Utilities and College Utilities Corp. are investor-owned utilities who provide water and wastewater service in the Fairbanks service area. In the instant case, the utilities jointly proposed rate increases, based upon a 2005 test year, additional to those already proposed in U-05-43/44 which is on appeal from the RCA in the Superior Court in 4FA-07-1360 CIV.

In the instant case, all parties have pre-filed direct testimonies and agreed to resolve certain disputed issues. The issues on appeal have a direct impact on the revenue requirements agreed to by the parties to the stipulated settlement. Meanwhile, rates will remain in effect on an interim and refundable basis until the appellate process is completed or until new rates are approved in a subsequent filing. Among other

things, GHU/CUC also agreed to file a new revenue requirement based on a test year ending no later than December 31, 2007.

A Stipulation Resolving Issues and Requesting Hearing Schedule Be Vacated was filed with the RCA for its approval on June 21, 2007.

DOE Reply Comments

FE No. 07-02-LNG, Kenai export license extension. On June 26, 2007, RAPA filed the Reply Comments of the State of Alaska to the Answer of Applicants ConocoPhillips Alaska and Marathon Oil Company in this federal proceeding. The Applicants previously filed with the Department of Energy (DOE) an Application for Blanket Authorization to (continue to) Export LNG from the Cook Inlet for a two year period beginning in April 2009.

Consistent with the state's earlier Motion to Intervene and the Governor's accompanying letter, the state's Reply Comments support the export application subject to three conditions: ensuring local utility needs are met, taking steps to provide for replacement of reserves exported, and allowing for open access to unused capacity of the LNG plant by other Cook Inlet producers.

RAPA prepared the Reply Comments in conjunction with the Department of Natural Resources, Oil & Gas Division. DOE has not announced any further procedural schedule in the proceeding.

New Case

RCA/U-06-61 et al, local telephone depreciation studies. Five local exchange telephone companies (LECs) filed their respective depreciation studies in compliance with prior stipulation with the AG/RAPA or RCA Order, as follows: Mukluk Telephone Company, Interior Telephone Company, United Utilities, Inc., United-KUC, Inc., and Copper Valley Telephone Cooperative. All of the studies were prepared by the same private sector vendor.

The RCA stayed all filing requirements and scheduled a consolidated hearing on June 19, 2007 to address first impression questions regarding the applicable, new depreciation regulations and whether the utilities' instant depreciation filings meet the intent of the new RCA regulations. Depreciation can be a significant factor in determining the revenue requirement and rates of a utility.

On June 8, 2007, the AG/RAPA filed a Notice of Election to Participate in the case and subsequently attended the first scheduled hearing. At this writing, the RCA has not yet set a further procedural schedule.

Torts and Workers' Compensation

In ***Paxton v. State*** the plaintiff sued the state alleging that CSSD's failure in the past to adjust/reduce his monthly child support payment had wrongfully caused a substantial arrearage to accumulate with interest. Over the 18-year course of the child's life the plaintiff paid a grand total of approximately $3,000.00. The state filed a motion for summary judgment arguing that the suit was barred by res judicata (the plaintiff had filed a vague lawsuit against the state six years earlier that had been dismissed on its merits), that the statute of limitations had run, that the state was immune from suits relating to child support collection pursuant to AS 09.65.250(2), that punitive damages cannot be assessed against the state, and discretionary function immunity under AS 09.50.250. The trial court granted summary judgment, and adopted all grounds that were argued by the state. The case was defended by AAGs Gene Gustafson and Pam Hartnell.

In ***Reust v. Alaska Petroleum Contractors***, Superior Court Judge Huguelet rejected plaintiff's arguments that a settlement agreement between plaintiff and defendant (entered into the without the state's participation, over the state's objection, and providing for no recovery to the state despite the jury's award of punitive damages and the Supreme Court's affirmance of that award)

operated to deprive the state of its statutory share of the punitive damage award. The trial court issued an order calculating the punitive damages award in the case at $716,525.52 and awarding the state 50% of that amount pursuant to AS 09.17.020(j) and the Alaska Supreme Court's order remanding the matter back to the trial court for re-calculation of the punitive damages amount. The order came after protracted motion practice, during which plaintiff's counsel strenuously objected to the state recovering any money at all. The court now will adjust the state's award to take plaintiff's contingency fee into account. The state, represented by AAG Ruth Botstein, also will move for Rule 82 fees incurred during the post-remand proceedings.

CRIMINAL DIVISION

Bethel DAO

Historically, sexual assault and sexual abuse of a minor cases have been a large part of the Bethel prosecutors' daily lives; that continued in June, 2007.

DA Joanis and ADA Thomas Jamgochian have been joined in handling the serious felony cases by ADA David Buettner. ADA Buettner conducted his first sexual assault grand jury, indicting boyfriend-girlfriend co-defendants for sexually assaulting a passed out twenty-three-year-old woman in Nunam Iqua.

M.N., a young sexual assault victim, was assisted by ADA Jamgochian in her search for justice. The man who sexually assaulted M.N. was sentenced in June. The defendant pled pursuant to a Rule 11 agreement to sexual assault in the second degree with ten years to serve, an additional five years suspended and ten years on probation. The defendant had no criminal history, adult or juvenile.
ADA A.J. Barkis is Bethel DAO's drug and alcohol prosecutor. He has been catching up on a backlog of bootleg and drug cases for grand jury. He has also been engaged in multiple misdemeanor trials this month in addition to all of his Bethel Therapeutic Court duties.

Rural Unit prosecutor ADA Regan Williams came to Bethel for a felony trial the week of the 18th and Rural Unit paralegal Nanette Lindsey helped out the last three days of the month.

Fairbanks DAO

Another busy month in Fairbanks with a combination of 97 misdemeanor and felony DUI's to date. The misdemeanor unit has had 333 new referrals of which 89 were DUI's. The felony unit had 65 new referrals with 8 being for felony DUI.

The new felony DUI's included one defendant who had two prior misdemeanor DUI's within the ten-year period and two felonies DUI's within the ten-year period.

The month's entertainment was provided by the felony DUI defendant who decided to run from Troopers when he was asked to perform field sobriety tests. Based on his two prior Minnesota convictions, he could see what was coming. He fled through a residential area in west Fairbanks on a road that runs north and south. When he came to a cross street, he turned left and sped off. By turning left, he would have been able to go across an ice bridge in the winter.

Unfortunately for him, it was not winter and he ran his vehicle into the Chena River. The driver then got out of the car as it sank, and he swam to the area of the Princess Hotel. He was captured in the woods near the Princess Hotel cold and wet after his early morning swim. In addition to facing two new felonies, the defendant once again proved that when you run from the police you only go to jail tired, and in this case, cold and wet.

As usual the misdemeanor unit was extremely busy with trials throughout the month. The felony unit was likewise busy with trials during the month.

Kenai DAO

Trials

On the trial front, ADA Jean Seaton won a DUI trial with the help of great expert testimony from Jeanne Swartz of the State Crime Lab. The big defense was interference to the Datamaster, and a stellar moment occurred when the defense attorney (a new public defender) asked Ms. Swartz if she was familiar with the Operator's Manual, and without skipping a beat, she answered him that she was, as she had written it. A hard answer to recover from … and he didn't. The jury convicted in record time.

The office also had a meth lab trial where the defendants were initially identified by an investigator reviewing the pseudoephedrine registry. That led to the residence, which led to a chase, which ultimately led to a search warrant and two meth labs. To demonstrate to the jury the dangerousness of meth labs, one of the clan-lab-certified officers came to testify in full space suit with air tanks and all. It made the point, and the jury convicted on all counts.

Indictments

The grand jury has been kept busy this month. Among the cases heard were eleven felony DUIs, five felony assaults, two sexual assaults against a minor, four misconducts involving controlled substances, and three burglaries. In one of the assaults, a group of men were attacking the victim because he wanted to leave their motorcycle gang. The leader of the gang was punching the victim with his fists, wearing large metal rings on each finger. In addition to the assorted skull rings and death heads, there was a ring that when you looked at it spelled M-I-T-C-I-V, which when punched into someone's body left an imprint like a rubber stamp that spelled "VICTIM".

Kodiak DAO

A 43-year-old Kenai woman pled guilty to a 2001 felony DWI and was sentenced to 24 months with 16 months suspended. Prosecution of this case had been delayed with this defendant who fled the jurisdiction in 2002. Fortunately the arresting officer was still employed by the Kodiak Police Department when the defendant returned to the state and was arrested on the outstanding bench warrant. This defendant will be placed on probation for five years after her release from incarceration, during which time she is ordered not to consume any alcohol.

A 38-year-old Kodiak man was convicted of felony assault in the third degree following a scuffle with a friend after they had watched a movie at the friend's house. The defendant announced he was going to his car to retrieve his backpack. After exiting the living room the victim thought he heard the man fall down in the kitchen. When the victim walked up behind the defendant as he was getting off the floor to ask if he was okay, the defendant stabbed blindly over his shoulder "in self defense". Copious amounts of alcohol had been imbibed by both defendant and victim. In the melee which followed, the victim had his lip and cheek sliced open as he was attempting to wrestle the knife away from the defendant. The defendant was sentenced to 36 months in jail with 30 months suspended. Following his release from incarceration this defendant will be placed on probation for five years under conditions which include that he neither possess nor consume any alcohol.

A 26-year-old Kodiak man was sentenced to 36 months in jail with 30 months suspended following his conviction for felony misconduct involving a controlled substance in the fourth degree. He was also given six months for possessing a firearm while he was intoxicated. Following his

release from incarceration he will be placed on supervised probation for five years under conditions which include that he neither possess nor consume any intoxicating beverages. All weapons seized were forfeited to the state.

Palmer DAO

Convictions

On June 1, 2007, a Palmer jury convicted Kira Gray, age 18, of murder in the first degree, three counts of murder in the second degree and kidnapping. In May 2005, when she was 16-years-old, Gray shot victim Terrell Houngues after her and others put him in the trunk of a car and drove him to a remote location in Houston, Alaska. The motive for the killing was retribution for the theft of cocaine from Gray's boyfriend, Mario Page, an Anchorage drug dealer. Page, who participated in the murder, but was not a shooter, was convicted of murder in the second degree and kidnapping earlier this year. Co-defendant Tommie Patterson's trial is coming up in August. Gray's trial lasted two weeks, and the jury returned the verdict after less than three hours of deliberation. Trial prosecutors for this case were DA Roman Kalytiak and ADA Jon-Marc Petersen; Debbie Fischer was the paralegal.

On June 4, 2007, another Palmer jury, after approximately one hour of deliberation, convicted Scott Gardner of felony eluding, assault in the third degree (on an Alaska State Trooper), driving under the influence, reckless endangerment, reckless driving and driving while license suspended. The jury did not buy Gardner's defense that he was a passenger and not the driver. Both of the troopers involved in the case were using in-car video cameras to tape the 20-mile pursuit. The jury also found the "most serious" aggravator. Gardner has two prior felony convictions, and he will be sentenced in September. ADA Suzanne Powell prosecuted this case for the state.

Jason Thompson, 19-years-old, was convicted of sexual abuse of a minor in the second degree after a jury trial, for having a sex with his 13-year-old girlfriend. He was also convicted of unlawful contact and violating conditions of release for maintaining contact with the victim after he was charged with sexual abuse. Thompson remains in custody pending sentencing. ADA Rachel Gernat handled this case for the state.

John M. Elder was convicted by a jury of assault in the third degree for strangling his girlfriend. He was also convicted of two counts of assault in the fourth degree (his sister tried to pull him off the girlfriend and was also assaulted by him), and the jury found the "domestic violence" aggravator. Elder's prior girlfriend testified at the trial about being strangled by him in the past. He is on felony probation and facing 33 months on the probation revocation and two to four years on the new convictions. ADA Rachel Gernat was also the prosecutor.

Despite a recanting victim, Jaysen Ewan was convicted of assault in the fourth degree after a jury trial. In December of 2006, after an argument, Ewan threw the victim to the ground and held her down by the throat. ADA Jarom Bangerter handled the case for the state.

On June 13, 2007, after a bench trial before Judge Kristiansen, a juvenile defendant was adjudicated on a charge of assault in the fourth degree. Trial prosecutors were ADA Suzanne Powell and summer intern Melissa Howard.

Indictments

ADA Richard Payne handled the following cases for the state:

Jesse Bishop was indicted on a charge of tampering with physical evidence for using a fake body part and manufactured urine when providing a urine sample to his probation officer. Despite Bishop's efforts, the urine still tested positive for drugs because he accidentally discharged some of his real urine into the cup.

Marcus Halla, Michael Halla, Laurel Floor and Lisa Meek were indicted on charges of assault in the second degree and assault in the third degree. The victim in the case was beaten with a baseball bat, piece of lumber, aluminum pipe, and a beer bottle, and was stabbed repeatedly.

Justin Bullock was indicted on a charge of attempted murder and multiple counts of assault in the second degree and assault in the third degree. While on a fishing boat, the captain, Michael Blanchard, woke up to find Bullock, one of his deckhands, with a raised Marlin spike shouting that he was going to kill him. Bullock stabbed Blanchard twice in the back. When the spike was knocked away, Bullock used his hands to strangle the captain, leaving bruising across the captain's chest and throat.

During the incident, Bullock also pulled two knives and nicked the victim's throat with one. Another crew member helped Blanchard subdue Bullock. After an eight-hour run back to Valdez, Captain Blanchard was flown to Anchorage for medical care, as his throat was very swollen. It was later discovered that an assortment of knives had been laid out, as if Bullock carefully chose which weapons he would use. The prosecutor for this case was ADA Michael Perry.

Sentencings

Judge Eric Smith sentenced Alex Headrick to 40 years, with a parole restriction of 40 years, on a charge of murder in the second degree. Headrick and accomplice Michael Linn bludgeoned victim Sean McIntire to death and slit his throat, after, (as part of the plan to rob McIntire) their girlfriends came to McIntire's home and persuaded him to take a shower with them. The murder occurred in 2003. Headrick pled to second-degree murder, but later tried a number of times to withdraw his plea. He also was represented by a number of different defense attorneys because of conflicts that arose during the life of this case. The case was prosecuted by ADA Richard Payne.

ADA Rachel Gernat prosecuted the following cases:

Edward Huntington was sentenced to ten years, with two years suspended, and seven years probation for raping his daughter while he was drunk. During the sentencing, the judge told Huntington that this was one of the worst victimizations any woman can experience.

Carl Oyagak was sentenced to four years, with two years suspended, for hitting his wife and strangling her in front of the children.

Timothy Purdy was sentenced to 18 months, with 12 months suspended, after pleading to Indecent Viewing. Purdy looked at his daughter's 12-year-old friend while she was taking a shower at his home.

SAVE THE DATE

July 22-25, 2007 CWAG Annual Meeting – Anaheim, CA